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Nos. 91-10 and 91-32

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN dba SORBOTURF ENTERPRISES,

Respondents.

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONERS

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RULES:

Supreme Court Rule 15.7 1

This brief is filed pursuant to Supreme Court Rule 15.7 to address issues raised in the Supplemental Brief of Petitioners in Support of Petition for Writ of Certiorari.

I

THE DISTRICT COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY ON ANTITRUST INJURY, WHICH IS A QUESTION OF LAW.

The Sorbothane petitioners persist in arguing that the jury should have been instructed on antitrust injury, and for the first time purport to cite to authority for this proposition. None of the cited cases held that the trial court must, or even should instruct the jury as to the antitrust injury. In *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1560 (11th Cir. 1990) and *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 n.2 (4th Cir.) *cert. denied*, 484 U.S. 823 (1987) the courts merely affirmed, based on consideration of the evidence, that the plaintiffs suffered antitrust injury. In *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107 (2nd Cir.) *cert. denied*, 493 U.S. 823 (1987), the court affirmed that plaintiff met its burden in opposition to summary judgment to show a disputed issue of material fact as to antitrust injury. Similarly, in *Int'l Travel Arrangers v. NWA, Inc.*, 723 F.Supp. 141, 150 (D.Minn. 1989) the court held that plaintiffs had sufficiently alleged antitrust injury to avoid dismissal. Neither case discusses whether antitrust injury is a question of law, let alone whether the jury must be instructed as to antitrust injury.

Petitioners also cite to the 1985 Supplement to the 1980 edition of *Antitrust Civil Jury Instructions*, published

by the ABA Section of Antitrust Law. Respondents do not have these (superseded) instructions, but judging from petitioners' other citations, respondents have no confidence these are antitrust injury instructions. At trial, Petitioners agreed that standing and antitrust injury are questions of law (Pretrial Order, Defendants/Appellants E.R., p. 184) and then submitted a pattern instruction on proximate cause with a definition of antitrust injury added on.

Furthermore, the 1987 and 1990 editions of *Sample Jury Instructions in Civil Antitrust Cases* published by the ABA Section of Antitrust Law do not include antitrust injury instructions, and in the introduction state

> Certain areas of antitrust law are omitted because they involve only questions of law, or because the likelihood or frequency of jury issues is minimal. *For example, there are no instructions relating to standing to sue. . . .*

Id. at p. xix (1987 edition) and p. xx (1990 edition) (emphasis added). Antitrust injury is a legal issue subsumed within antitrust standing. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (competitor that has not suffered antitrust injury does not have standing under the antitrust laws). Therefore, the ABA Section on Antitrust has recognized, at least for the last five years, that the jury should not be instructed on antitrust injury.

II

THE NINTH CIRCUIT DID NOT ERR IN UPHOLDING THE JURY'S SECTION 1 VERDICT FOR RESALE PRICE MAINTENANCE.

Petitioners attack the resale price fixing verdict on the ground that under *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), respondents must show an agreement as to price levels between the manufacturer and the surviving distributors. While Petitioners did not raise this point in their Petition for Writ of Certiorari,[1] the agreement to fix prices and terminate price cutting distributors in this case fits squarely within the definition of per se unlawful vertical price fixing in *Sharp*.

There was substantial evidence that respondent Sorboturf was terminated pursuant to a specific agreement to maintain resale prices. The agreement between Sorbothane (the manufacturer) and the two surviving distributors was that each distributor would maintain resale prices, and in return Sorbothane, Inc. would terminate regional distributors. The two distributors who entered into this agreement with Sorbothane were petitioner Kenneth Leighton Jr., whose company Spectrum Sports became the exclusive national distributor to athletic retailers, and John Burne, whose company IEM became the exclusive distributor to medical retailers.[2] The

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[1] The petition discusses *Sharp* only in the context of whether respondents suffered antitrust injury. Petition for Writ of Certiorari, p. 19.

[2] While the regional distributors expressly agreed to fix prices, (R.T. p. 828, lines 1-13) Sorbothane was not satisfied

(Continued on following page)

so-called medical market was simply retailers who sold medical supplies. The same Sorbothane insole was repackaged for these retailers, and sold at twice the price of the athletic insole. (R.T., Vol. V, pp. 834, line 20 – 835 line 10.)

Petitioners do not challenge the sufficiency of the evidence of the agreement. Petitioners instead attempt to show that the verdict was inconsistent with a finding of conspiracy between Sorbothane and its new exclusive distributors. As to Spectrum Sports, petitioners again urge that since Spectrum Sports was not found liable on the vertical price fixing claim, the jury must have concluded that it did not agree to maintain resale prices. Respondents address this contention in their Response to the Brief For the United States as Amicus Curiae, at p. 6, n.2.

Petitioners claim that IEM "could not have been a Section 1 conspirator because it distributed medical products – products which were not functional substitutes for, and so were not competitive with, the athletic products sold by Respondents in the submarket as defined by Respondents and the District Court." That is nonsense.[3]

(Continued from previous page)

with their performance in maintaining retail prices. For example, respondent Sorboturf failed to police all of its retailers. (R.T. Vol II, p. 300, lines 2-6.) Spectrum Sports, on the other hand, was an enthusiastic price fixer. Leighton Jr. boasted to Sorbothane, Inc. of his techniques in enforcing retail list price. (R.T. Vol. V., p. 830, lines 13-25.)

[3] It is also untrue. The relevant market proposed by respondents included all Sorbothane shoe inserts. (Pretrial Order ¶ 141, Spectrum. E. R. p. 111.)

First, the relevant product market has nothing to do with the analysis of per se vertical price fixing. Respondents need only show they were terminated as part of an agreement to fix prices on a product or products.

Second, the purpose of the price fixing and dealer termination agreement in this case was to maintain resale prices in both the so-called "medical" and "athletic" markets. Before the agreement to terminate the regional distributors, respondents and the other regional distributors sold sorbothane insoles to athletic and medical retailers. (R.T. Vol. V, pp. 833 line 18 – 834 line B.)[4] IEM objected to this, since it interfered with John Burne's plan to charge double the athletic insert price to the medical market. (*Id.*) Therefore, under the agreement between Sorbothane, Inc., Spectrum Sports and IEM, the regional distributors were to be terminated, the surviving exclusive distributors would sell at different prices to these different retailers. Spectrum Sports agreed to maintain the price (in the newly separated athletic market) which the regional distributors had failed to maintain. IEM would maintain an even higher price to medical retailers.

John Burne endorsed the plan to have Spectrum Sports as the sole national distributor to athletic retailers because he knew that Leighton Jr. would enforce price agreements for the sale of the athletic insoles, and thus

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[4] The only difference between the two insoles was the color. (R.T. Vol. X, p. 1753, lines 17-21; pp. 1754, line 22 – 1755 line 9.)

minimize the price competition with the medical insoles. (*Id.* pp. 835 line 8 – 836 line 18.)[5]

Therefore, it is absurd for petitioners to now argue that IEM could not have been a Section 1 conspirator with Sorbothane, Inc. It was IEM's idea to call the meeting at which the agreement to terminate respondents and reinvigorate the price fixing plan was reached. (*Id.* p. 833 lines 16-25.) Respondents were terminated to enable IEM to charge higher fixed prices in the newly designated medical market. (*Id.* p. 834 lines 1-24.) In short, the agreement between petitioner (Sorbothane, Inc.), Spectrum Sports and IEM to terminate regional distributors and then maintain fixed prices was sufficient to support the vertical price fixing claim. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) ("a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels").[6]

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[5] As Ms. Heinsohn testified at trial, "A doctor could go down to a sporting goods store and buy a pair of insoles cheaper than getting it from John Burne." (R.T. Vol. V, p. 835 lines 8-10.) This was the problem the termination of regional distributors was intended to solve.

[6] If the Court has any concern whether respondents have satisfied the elements of *Sharp*, respondents urge the Court to review pages 823-843 of the Trial Transcript, wherein Ms. Heinsohn, the marketing manager for Sorbothane, Inc., describes the meeting she attended with John Burne and Leighton Jr. The Trial Transcript of this testimony is appended to this brief.

III

REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *COPPERWELD* ISSUES

Respondents do not concede there was any error in the jury instructions under *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984). Respondents' discussion of the *Copperweld* issue in their response to the brief by the United States merely shows that even if there were error, remand on this issue would serve no purpose, since (1) there was no evidence entitling petitioners to a *Copperweld* defense, (2) the vertical price fixing verdict could not have been based on a conspiracy between the affiliated companies, and (3) there were multiple verdicts on section 2 and RICO claims, each of which would support the entire damage award.

Petitioners discussion of the *Copperweld* issues is limited to conclusions and curious citations. On the issue of whether there was evidence to support a *Copperweld* defense, petitioners refer to the Amicus Curiae brief at pp. 13-14. Yet the United States concludes that "the jury may have found a conspiracy because it did not believe that petitioners presented sufficient evidence of their affiliation." Moreover, apart from what the jury may have done, the record would not support a defense to either section 1 claim based on *Copperweld*.

Petitioners refer to Amicus Curiae brief, p. 14 n.11 on whether the vertical price fixing verdict was based on a conspiracy between affiliated companies. There, the United States acknowledges that the jury was instructed that it must find an agreement between firms at different levels of a chain of distribution, and thus the verdict

could be based (as it was) on an agreement between the Sorbothane petitioners and independent distributors. While the United States goes on to note (without explanation) that "the issue is further complicated" because IEM was a medical insole distributor, as is discussed above, the agreement to fix prices and terminate respondents was directly tied to price fixing agreements on sorbothane insoles sold to both medical and athletic retailers.

IV

REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *LESSIG* PRESUMPTION.

On *Lessig*, petitioners reach the odd conclusion that "Respondents apparently agree that *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.) *cert. denied*, 377 U.S. 993 (1964) is not the law." *Lessig* is well-settled law in the Ninth Circuit. Respondents' point is that *if* this Court wishes to review the *Lessig* presumption, this is not the case to do it. If the Court agrees, further review by the Ninth Circuit will serve no purpose.

V

CONCLUSION

Respondents urge the Court to look beyond the conclusion of the United States that the Ninth Circuit's opinion is unclear or contains error in considering whether to summarily reverse and remand for another one to three years of review. The record before this Court amply demonstrates that further review would lead to the same

outcome between the parties and therefore serve no purpose. Respondents respectfully request that the Court consider the record, which demonstrates the jury was properly instructed, and the antitrust verdicts are supported by substantial evidence.

Respectfully submitted,

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APPENDIX

Portions of Trial Testimony of Laurene Heinsohn

MENT THAT WAS DONE FOR THE PROMOTION OF SORBOTHANE PRODUCTS?

A. THEY PAID SOME, YES.

Q. WHAT DID THEY PAY? WHAT DID HAMILTON KENT OR SORBOTHANE PAY FOR DURING THAT ENTIRE PERIOD?

A. THEY SUPPORTED THE SPORTING GOODS TRADE SHOWS, FOR EXAMPLE, SUPPORTING THE DEVELOPMENT OF THE BOOTH USED IN THAT TRADE SHOW; AND THEY DID HAVE AN ADVERTISING ALLOTMENT FOR OUR ADVERTISING BUDGET, WHATEVER THAT TOTAL WAS. THEY DID HAVE A PERCENT SHARE OF THE CONTRIBUTION IN THAT.

Q. DESCRIBE HOW THAT RELATED TO THE CONTRIBUTION OF THE REGIONAL DISTRIBUTORS, IF YOU CAN.

WAS THE CONTRIBUTION OF HAMILTON KENT INSIGNIFICANT IN RELATION TO WHAT THE REGIONAL DISTRIBUTORS WERE DOING FOR DIRECT ADVERTISING?

A. I DON'T KNOW IF "INSIGNIFICANT" IS THE RIGHT WORD. IT WAS NOT THE SAME RATIO, PER SE, AS FAR AS THE BENEFIT RECEIVED.

Q. NOW, AS THE MARKETING MANAGER OF THE SORBOTHANE DIVISION OF HAMILTON KENT, AS OF YEAR END, 1981, DID YOU FEEL, AS THE MARKETING MANAGER, THAT AN ORAL AGREEMENT HAD BEEN REACHED WITH SHIRLEY MC CONE REGARDING HER SERVICES AS DISTRIBUTOR?

MR. BOMSTER: OBJECTION.

THE COURT: SUSTAINED.

BY MR. SHOHET:

Q. I WOULD LIKE TO NOW ASK YOU, MS. HEINSOHN, A LITTLE BIT CONCERNING PRICING POLICY AT HAMILTON KENT AND SORBOTHANE.

[824]

DID YOU HAVE DISCUSSIONS WITH ANY OF THE DISTRIBUTORS CONCERNING AT WHAT PRICE, IF ANY, THEY WOULD BE PERMITTED TO RESELL SORBOTHANE PRODUCTS?

A. YES.

MR. BOMSTER: IF IT PLEASE THE COURT, MAY I HAVE A TIMEFRAME ON THIS, PLEASE?

THE COURT: I ASSUME HE WILL.

BY MR. SHOHET:

Q. DID YOU HAVE DISCUSSIONS WITH THEM SHORTLY AFTER THE DISCUSSIONS THAT YOU IDENTIFIED WHERE YOU SAID, "GO AHEAD AND BEGIN MARKETING"?

A. YES.

Q. SO THAT WOULD BE IN THE FALL TO WINTER, 1981?

A. YES.

Q. WHAT DID YOU TELL THEM WITH REGARD TO THE RESALE PRICE OF SORBOTHANE BY THE DISTRIBUTORS?

A. TO MAINTAIN THE RESALE PRICE.

THE COURT: WHAT WAS THAT TO BE, 50 PERCENT MARKUP, MA'AM?

THE WITNESS: YES.

BY MR. SHOHET:

Q. AND DID YOU HAVE DISCUSSIONS WITH KENNETH M. LEIGHTON CONCERNING YOUR DIRECTION TO THE DISTRIBUTORS TO HOLD THE RESALE PRICE AT A 50 PERCENT MARKUP?

A. YES.

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Q. AND DID KENNETH M. LEIGHTON GIVE YOU ANY PARTICULAR DIRECTION WITH REGARD TO THAT SUBJECT? DID HE TELL YOU TO GO AHEAD AND TELL THE DISTRIBUTORS TO DO THAT?

MR. BOMSTER: OBJECTION.

THE COURT: NO. I WILL NOTE YOUR OBJECTION AND OVERRULE IT.

YOU CAN ANSWER IT NOW.

THE WITNESS: YES. MR. LEIGHTON, SR., TOLD ME TO MANAGE THE DISTRIBUTORS TO MAINTAIN THAT WHOLESALE PRICE.

Q. DID MR. LEIGHTON, DURING THE ENTIRE COURSE OF YOUR EMPLOYMENT AT HAMILTON KENT OR SORBOTHANE, INC., EVER TELL YOU TO CONTACT A DISTRIBUTOR BECAUSE THERE WAS DISCOUNTING GOING ON IN THAT DISTRIBUTOR'S TERRITORY?

A. YES.

Q. ON HOW MANY OCCASIONS DO YOU RECALL KENNETH M. LEIGHTON TELLING YOU TO CONTACT A DISTRIBUTOR AS A RESULT OF DISCOUNTING?

A. ONE SPECIFIC TIME THAT I REMEMBER.

Q. WHAT WERE THE CIRCUMSTANCES OF THAT SPECIFIC INSTANCE? DO YOU REMEMBER THE TIME?

A. YES. IN NOVEMBER OF 1981, MARTY VOGEL WAS SELLING BELOW WHAT WE HAD – BELOW WHAT WE HAD RECOMMENDED AS THE WHOLESALE PRICE.

Q. HOW DID YOU LEARN THAT HE WAS DOING THAT?

A. KEN LEIGHTON, JR., DISCOVERED IT AND NOTIFIED MYSELF AND

KEN LEIGHTON, SR.

Q. DID YOU DISCUSS THAT WITH KEN LEIGHTON, SR.?

A. YES.

Q. WHAT DID YOU DISCUSS? WHAT DID HE SAY AND WHAT DID YOU SAY?

A. HIS REQUEST TO ME WAS TO CALL MARTY AND TO ASK MARTY TO MAINTAIN THE PRICE THAT WE HAD ASKED HIM TO MAINTAIN.

Q. DID YOU DO SO?

A. YES.

Q. DID MR. VOGEL TELL YOU – WHAT DID MR. VOGEL SAY TO YOU WITH REGARD TO YOUR REQUEST THAT HE HOLD THE PRICE?

A. MR. VOGEL RESPONDED POSITIVELY.

Q. DID YOU HAVE DISCUSSIONS WITH OTHER DISTRIBUTORS REGARDING THEIR HOLDING THE RESALE PRICE?

A. YES.

Q. DID THE OTHER DISTRIBUTORS – DID MR. VOGEL AND THE OTHER DISTRIBUTORS AGREE TO HOLD THE RESALE PRICE OF SORBOTHANE IN THEIR TERRITORY?

MR. BOMSTER: OBJECTION.

MR. MAC ADAMS: FOUNDATION, YOUR HONOR.

THE COURT: I THINK WE ARE GETTING INTO SOME OTHER AREAS. IT SMACKS OF HEARSAY, SIR. I DON'T KNOW WHAT OTHER PURPOSE IT WOULD HAVE.

MR. SHOHET: SIMPLY TO ESTABLISH AN AGREEMENT; AND IT'S REALLY VERBAL CONDUCT.

THE COURT: HOW ARE YOU GOING TO DO THAT? ARE YOU GOING TO DO EACH INDIVIDUAL DISTRIBUTOR?

MR. SHOHET: I CAN DO THAT.

BY MR. SHOHET:

Q. MS. HEINSOHN, DID ANY OF THE DISTRIBUTORS EXPRESS A WILLINGNESS OR AGREEMENT TO HOLD THE RESALE PRICE OF SORBOTHANE?

MR. BOMSTER: OBJECTION, NO FOUNDATION.

THE COURT: LAY A FURTHER FOUNDATION.

BY MR. SHOHET:

Q. FIRST, IF YOU WOULD SAY WHAT OCCURRED, AND THEN I WOULD LIKE TO KNOW WHEN AND WHAT CIRCUMSTANCES.

A. YES, IT DID OCCUR.

Q. WITH WHICH DISTRIBUTORS DID YOU REACH AN AGREEMENT ON THEIR PART TO HOLD THE RESALE PRICE?

MR. MAC ADAMS: OBJECTION.

MR. VAIL: OBJECTION.

THE COURT: I WILL NOTE YOUR OBJECTION.

WAS THERE ANY DISSENT FROM THAT, MA'AM, ON HOLDING THE PRICE BY ANY DISTRIBUTORS?

THE WITNESS: YES.

THE COURT: OKAY. YOU MAY INQUIRE.

BY MR. SHOHET:

Q. WHICH OF THE DISTRIBUTORS DISAGREED OR WERE UNWILLING? WHICH, IF ANY, WERE UNWILLING TO HOLD THE PRICE?

A. R.H.R. AND SORBOTURF.

[828]

Q. DID MARTY VOGEL EXPRESS A WILLINGNESS TO HOLD THE RESALE PRICE?

A. YES.

Q. DID KENNETH B. LEIGHTON?

A. YES.

Q. DID ARNIE LUND EXPRESS A WILLINGNESS TO DO SO?

A. YES.

Q. DID YOU EVER DISCUSS WITH ANY OF THE DISTRIBUTORS WHETHER, IF THEY FAILED TO HOLD THE RESALE PRICE OF SORBOTHANE, THEIR RIGHT TO CONTINUE TO ACT AS A DISTRIBUTOR WOULD BE AFFECTED?

A. YES.

Q. WITH WHOM DID YOU HAVE THOSE DISCUSSIONS.

A. SPECIFICALLY WITH MARTY VOGEL.

Q. WHAT DID YOU TELL MR. VOGEL WITH REGARD TO THE CONSEQUENCES TO HIS DISTRIBUTORSHIP IF HE DID NOT MAINTAIN THE RESALE PRICE?

A. THAT IT WOULD REFLECT NEGATIVELY REGARDING HIS PERFORMANCE APPROVAL OR EVALUATION.

Q. DID YOU DISCUSS WITH KENNETH M. LEIGHTON THE FACT THAT YOU EITHER HAD OR MADE SUCH A STATEMENT TO MR. VOGEL?

A. I WAS DIRECTED BY MR. LEIGHTON TO MAKE THAT STATEMENT.

Q. DID YOU UNDERSTAND THAT THE OTHER DISTRIBUTORS – STRIKE THE QUESTION.

TO YOUR KNOWLEDGE, WERE THE OTHER DISTRIBUTORS AWARE OF THE FACT THAT, IF RESALE PRICES WERE NOT MAINTAINED, THEIR DISTRIBUTORSHIP WOULD BE IN JEOPARDY?

[829]

MR. MAC ADAMS: OBJECTION.

MR. VAIL: OBJECTION.

THE COURT: I WILL OVERRULE THE OBJECTION. YOU CAN ANSWER THAT.

THE WITNESS: YES.

BY MR. SHOHET:

Q. NOW, I WOULD LIKE TO TALK TO YOU A LITTLE BIT WITH REGARD TO THE PRICING POLICIES, IF ANY, THAT RELATED TO THE RETAIL PRICE FOR SORBOTHANE.

DID YOU HAVE DISCUSSIONS WITH ANY OF THE DISTRIBUTORS CONCERNING THEIR RESPONSIBILITIES TO SEE THAT THE RETAIL PRICE OR THE PRICE SOLD BY THEIR CUSTOMERS TO THE PUBLIC WAS FIXED?

A. YES.

Q. WITH WHOM DID YOU HAVE SUCH DISCUSSIONS?

A. MARTY VOGEL.

Q. ANY OTHERS?

A. HE'S THE ONLY ONE I SPECIFICALLY REMEMBER.

Q. DO YOU REMEMBER WHEN THAT CONVERSATION OR CONVERSATIONS TOOK PLACE?

A. I BELIEVE IN THE SAME TIMEFRAME, FALL OF 1981.

Q. TELL ME WHAT YOU TOLD MR. VOGEL WITH REGARD TO HIS RESPONSIBILITIES AS TO THE RETAIL PRICE.

A. THAT, IF THERE WAS – THERE WAS ONE SPECIFIC CASE IN WHICH A RETAILER WAS SELLING BELOW RECOMMENDED LIST IN HIS TERRITORY; AND WE REQUESTED THAT MARTY FOLLOW UP ON THAT ACCOUNT AND FIND

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OUT WHAT THE PROBLEM WAS AND TO RECTIFY IT.

Q. WAS THAT A CIRCUMSTANCE - DO YOU REMEMBER THE STATE IN WHICH THE RETAILER WAS UNDERCUTTING THE RETAIL PRICE?

A. NO, I DON'T.

Q. IF I SAID WEST VIRGINIA, WOULD THAT REFRESH YOUR RECOLLECTION?

A. I RECALL THAT THERE WAS A PROBLEM IN WEST VIRGINIA. I DON'T RECALL IF THAT ONE WAS SPECIFICALLY TIED TO MARTY VOGEL.

Q. THE PROBLEM THAT YOU RECALL IN WEST VIRGINIA, WAS THAT ALSO RELATED TO A RETAILER NOT SELLING AT THE, QUOTE, "RECOMMENDED," CLOSE QUOTE, LIST PRICE?

A. YES.

Q. DID YOU EVER HAVE A DISCUSSION WITH KENNETH B. LEIGHTON WHERE HE TOLD YOU WHAT, IF ANYTHING, HE DID, TO CONTROL RETAIL PRICES IN HIS TERRITORY?

A. YES.

Q. DO YOU REMEMBER WHEN - DID YOU HAVE MORE THAN ONE CONVERSATION WITH KENNETH B. LEIGHTON ON THAT SUBJECT?

A. NO.

Q. DO YOU REMEMBER WHEN THAT CONVERSATION OCCURRED?

A. I BELIEVE IT OCCURRED AFTER I STARTED WORKING FOR HIM, WHICH WOULD PUT IT IN EARLY SPRING OF 1983.

Q. WHAT DID HE TELL YOU WITH REGARD TO WHAT STEPS, IF ANY, HE TOOK TO SEE THAT HIS RETAILERS HELD THE PRICE?

A. HE WOULD SLOW DOWN SHIPMENTS.

[831]

Q. HE TOLD YOU THAT?

A. YES.

Q. HE SAID HE SLOWED SHIPMENTS AS A MEANS OF KEEPING THE RETAIL PRICES FIXED?

A. YES.

Q. DID MR. LEIGHTON EVER TELL YOU TO CONTACT A DISTRIBUTOR AS A RESULT OF THAT A RETAILER IN THAT DISTRIBUTOR'S TERRITORY WAS UNDERCUTTING THE RETAIL PRICE?

A. I AM SORRY, REPEAT THE QUESTION.

Q. DID MR. LEIGHTON, SR., EVER TELL YOU TO CONTRACT THE DISTRIBUTOR BECAUSE HE HAD LEARNED - "HE" BEING MR. LEIGHTON, SR. - HAD LEARNED THAT A RETAILER IN THAT DISTRIBUTOR'S TERRITORY WAS SELLING BELOW THE RETAIL PRICE?

A. THE ONE SPECIFIC CASE THAT HE TOLD ME TO FOLLOW UP WAS ON THE WEST VIRGINIA ISSUE.

Q. DID HE TELL YOU TO CONTACT THE DISTRIBUTOR THAT COVERED THE WEST VIRGINIA TERRITORY BECAUSE HE LEARNED THAT A RETAILER WAS SELLING BELOW THE RECOMMENDED PRICE?

A. YES.

Q. DO YOU REMEMBER WHO THE DISTRIBUTOR WAS AT THAT TIME THAT WAS COVERING THE TERRITORY?

A. I BELIEVE THAT IT WAS OHIO CUSHIONS AT THAT TIME.

Q. DO YOU REMEMBER THE NAME OF THE RETAILER THAT WAS CUTTING THE PRICE?

A. NO.

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Q. DO YOU REMEMBER THE OTHER OCCASIONS WHERE THE FACT THAT A RETAILER WAS UNDERCUTTING THE SUGGESTED RETAIL PRICE CAUSED MR. LEIGHTON TO TELL YOU TO DO SOMETHING?

A. NO.

Q. ALL RIGHT. NOW, I WOULD LIKE TO MOVE YOUR ATTENTION, IF I MIGHT, TO A MEETING AT KENNETH B. LEIGHTON'S OFFICE, WHEREIN YOU WERE PRESENT, JOHN BURNE WAS PRESENT, AND KENNETH M. LEIGHTON WAS PRESENT, APPROXIMATELY A WEEK TO TEN DAYS BEFORE THE FEBRUARY DISTRIBUTORS' MEETING.

DO YOU HAVE THAT MEETING IN MIND?

A. YES.

Q. JUST TO SET THE CONTEXT, DO YOU REMEMBER THE DATE OR APPROXIMATE DATE THAT THAT MEETING OCCURRED?

A. APPROXIMATE DATE, LAST WEEK IN JANUARY.

Q. AS OF THIS MEETING, HAD JOHN BURNE'S APPOINTMENT AS THE NATIONAL MEDICAL DISTRIBUTOR ALREADY BEEN ANNOUNCED TO THE REGIONAL DISTRIBUTORS?

A. YES.

Q. AND THERE WAS A MEETING SCHEDULED AT THIS TIME IN CHICAGO, ON FEBRUARY 10, BETWEEN ALL THE DISTRIBUTORS, ALL THE REGIONAL DISTRIBUTORS, CORRECT?

A. YES.

Q. AND THIS MEETING OCCURRED WHERE? WAS IT AT – WHERE DID THE MEETING OCCUR?

A. WE HAD THE MEETING, I BELIEVE, IN – AT THE MC CORMICK INN,

[833]

WHICH IS THE HOTEL THAT THE MAJORITY OF US WERE STAYING IN AT THIS TIME.

Q. THAT'S THE FEBRUARY CHICAGO MEETING?

A. RIGHT.

Q. ALL RIGHT. NOW, I AM GOING BACK TO THE MEETING INVOLVING MR. BURNE, YOURSELF, AND KENNETH M. LEIGHTON, SR., AND KENNETH B. LEIGHTON.

WHERE DID THAT OCCUR?

A. THAT MEETING TOOK PLACE IN KEN B. LEIGHTON'S OFFICE.

Q. AGAIN, THAT WAS ABOUT A WEEK OR TEN DAYS BEFORE THE CHICAGO MEETING?

A. YES.

Q. DID YOU DISCUSS WITH KENNETH M. LEIGHTON, PRIOR TO THE MEETING, WHAT HIS PURPOSE WAS?

A. YES.

Q. WHAT WAS YOUR UNDERSTANDING OF ITS PURPOSE, BASED ON THAT CONVERSATION?

A. THE PURPOSE FOR THE MEETING – AND THE MEETING WAS PRIMARILY MOTIVATED AT THE REQUEST OF JOHN BURNE – WAS TO REEVALUATE OUR MARKETING APPROACH; AND WHAT WE MEAN BY THAT IS: WE HAD JUST ANNOUNCED A CENTRALIZED NATIONAL DISTRIBUTOR FOR THE MEDICAL MARKET; AND, ON THE OTHER SIDE, WE HAD FIVE REGIONAL DISTRIBUTORS SELLING SHOE INSERTS TO THE RETAIL MARKET. SO THERE WAS A LOT OF OVERLAP ON THAT. JOHN BURNE FELT THAT THAT WAS GOING TO BE A PROBLEM.

[834]

Q. DID MR. BURNE EXPRESS HIS VIEWS ON THAT SUBJECT TO YOU?

A. YES.

Q. DID HE SAY WHY HE FELT THAT IT WOULD BE A PROBLEM CONTINUING TO DEAL WITH FIVE REGIONAL DISTRIBUTORS?

A. IT WOULD BE A PROBLEM OF CONTROL FOR HIM AND – BECAUSE THE FIVE ORIGINAL DISTRIBUTORS WERE MARKETING TO RETAIL MEDICAL OUTLETS, THE SAME MARKET THAT JOHN BURNE WAS GOING TO BE APPROACHING.

Q. WAS JOHN BURNE'S PRICE TO HIS CUSTOMERS – STRIKE THE QUESTION.

WAS THE PRICE AT WHICH JOHN BURNE'S CUSTOMERS INTENDED TO SELL SORBOTHANE HIGHER THAN THE PRICE AT WHICH THE RETAIL CUSTOMERS WERE SELLING SORBOTHANE TO RETAIL ACCOUNTS OR RETAIL CONSUMERS?

A. YES.

MR. MAC ADAMS: OBJECTION. FOUNDATION, YOUR HONOR.

THE COURT: I WILL OVERRULE THE OBJECTION. THE ANSWER MAY STAND.

BY MR. SHOHET:

Q. WAS THERE ANY DISCUSSION ABOUT THE PRICE DIFFERENCE BETWEEN THE PRICE OF SORBOTHANE IN THE MEDICAL MARKET AND THE PRICE OF SORBOTHANE IN THE ATHLETIC MARKET AS A FACTOR CAUSING THE NEED FOR THIS MEETING?

A. YES.

Q. DID YOU HAVE SUCH DISCUSSIONS WITH JOHN BURNE CONCERNING

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HOW THE PRICE DIFFERENTIAL AFFECTED THE NEED FOR CONTROL OF THE MARKET?

A. JOHN BURNE'S MARKETING APPROACH WAS THAT HE WAS SELLING THE SAME INSOLE THE OTHER FIVE DISTRIBUTORS WERE SELLING, PURCHASING THAT INSOLE FOR LESS THAN THE OTHER DISTRIBUTORS WERE PURCHASING IT FOR, AND THEN RESELLING IT FOR APPROXIMATELY TWICE AS MUCH AS WHAT THE SPORTING GOODS STORES WERE SELLING IT FOR. SO, IN ESSENCE, WHAT WAS HAPPENING WAS: A DOCTOR COULD GO DOWN TO A SPORTING GOODS STORE, BUY A PAIR OF INSOLES CHEAPER THAN GETTING IT FROM JOHN BURNE.

Q. AND DID MR. BURNE EXPRESS TO YOU OR ANYONE ELSE AT THE MEETING A DESIRE TO HAVE A SINGLE NATIONAL DISTRIBUTOR IN THE SPORTS MARKET?

A. THAT WAS JOHN BURNE'S DESIRE.

Q. DID HE SAY WHY HE WANTED A SINGLE NATIONAL DISTRIBUTOR IN THE SPORTS MARKET?

A. IT WOULD BE EASIER FOR HIM TO ENTER INTO AN AGREEMENT WITH ONE PERSON, PERHAPS ENTICE THAT PERSON TO ALSO RAISE THEIR PRICES, OR AT LEAST NOT INFRINGE ON HIS MARKET.

Q. NOW, WAS THERE A DISCUSSION AT THIS MEETING CONCERNING WHAT, IF ANYTHING, TO DO TO THE OTHER REGIONAL DISTRIBUTORS, THAT IS THE DISTRIBUTORS OTHER THAN KENNETH B. LEIGHTON?

A. YES.

Q. TELL ME WHO SAID WHAT ON THE SUBJECT OF WHAT TO DO ABOUT THE OTHER REGIONAL DISTRIBUTORS?

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A. WELL, TO SET UP THE MEETING, THE MEETING WAS CALLED TO DISCUSS – BY JOHN BURNE TO DISCUSS HOW WE COULD REALIGN THE RETAIL MARKETING ON THE INSOLES OF THE FIVE DISTRIBUTORS TO A NATIONAL SYSTEM. THAT WAS THE POINT OF THE MEETING.

THE NEXT STEP WAS: HOW WOULD YOU DO THIS WITH THE FIVE DISTRIBUTORS? THE FIRST RECOMMENDATION FROM JOHN BURNE AND KEN LEIGHTON, SR., WAS SIMPLY THAT HE WOULD CANCEL THEM AND THEN NAME ONE NATIONAL DISTRIBUTOR.

Q. WAS THERE DISCUSSION ABOUT WHO THAT NATIONAL DISTRIBUTOR WOULD BE?

A. YES.

Q. AND WHO WAS – WHO WAS THE NATIONAL DISTRIBUTOR TO BE IN THOSE DISCUSSIONS?

A. KEN LEIGHTON, JR.

Q. DO YOU REMEMBER BOTH KENNETH M. LEIGHTON AND JOHN BURNE SUGGESTING THAT THE OTHER REGIONAL DISTRIBUTORS SIMPLY BE CANCELED?

A. YES.

Q. DID YOU SAY ANYTHING IN RESPONSE TO THE SUGGESTION IN OR ABOUT JANUARY OF 1982 CONCERNING THE CANCELLATION OF THE OTHER REGIONAL DISTRIBUTORS?

A. YES. MY CONCERN – AND I WAS AT THE MEETING, ALSO. MY CONCERN WAS THAT I FELT THAT WE HAD GIVEN A VERBAL COMMITMENT TO THESE FIVE DISTRIBUTORS AND HAD ENTERED INTO A RELATIONSHIP WITH THEM. I DID NOT UNDERSTAND HOW WE COULD CANCEL THESE

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DISTRIBUTORS WITHOUT CAUSE; AND TO TAKE THAT ONE STEP FURTHER, IF WE DID CANCEL THE DISTRIBUTORS WITHOUT CAUSE, THAT THERE WOULD BE SOME LEGAL RAMIFICATIONS FOR THAT.

Q. FOLLOWING YOUR COMMENT IN THAT REGARD, WAS A SECOND ALTERNATIVE DISCUSSED CONCERNING HOW TO MAKE KENNETH B. LEIGHTON THE NATIONAL DISTRIBUTOR?

A. YES.

Q. WHAT WAS THE SECOND ALTERNATIVE?

A. THE SECOND ALTERNATIVE WAS TO CONVINCE R.H.R., SORBOTURF, TRIAD, ABSORBOTECH, THE FOUR OTHER DISTRIBUTORS, TO RECOGNIZE KEN AS A NATIONAL MANAGER IN THAT PARTICULAR MARKET, AND HE WOULD MANAGE THE BUSINESS FOR THESE FOUR OTHER DISTRIBUTORS. THEY WOULD MAINTAIN THEIR TERRITORIES, BUT THE BUSINESS DECISIONS ON HOW TO MARKET WOULD BE MANAGED BY KEN.

Q. WAS THERE SOME DISCUSSION AS TO JUST HOW YOU WOULD GO ABOUT CONVINCING THE OTHER REGIONAL DISTRIBUTORS THAT KENNETH B. LEIGHTON AND OHIO CUSHIONS WOULD BE THE NATIONAL LEADER OF THE MARKET?

A. YES.

Q. WHAT WAS DISCUSSED ON THAT SUBJECT AT THE MEETING?

A. THE REASON WE FELT THAT THIS MIGHT BE A VIABLE ALTERNATIVE IS THAT KEN DID HAVE THE STRONGEST BUSINESS SENSE OF THE FIVE DISTRIBUTORS, OR AT LEAST THAT WAS OUR PERSPECTIVE AT THE TIME; AND SO WE WANTED TO USE THAT ARGUMENT, THAT IT MAY BE BENEFICIAL FOR THEM TO RECOGNIZE THAT EXPERTISE AND TAKE ADVANTAGE OF

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IT.

Q. DID KENNETH M. LEIGHTON, AT OR SHORTLY AFTER THIS MEETING, GIVE YOU DIRECTION TO ATTEMPT TO PORTRAY KENNETH B. LEIGHTON AND HIS COMPANY AS THE NATIONAL LEADER AMONG THE DISTRIBUTORS?

A. I WAS TOLD TO PURSUE THAT, YES.

THE COURT: DON'T LEAD IN THIS AREA, SIR. LET HER TESTIFY.

MR. SHOHET: ALL RIGHT.

BY MR. SHOHET:

Q. DID YOU HAVE SUCH A DISCUSSION WITH KENNETH M. LEIGHTON AT THE MEETING ITSELF?

A. THE MEETING RESOLVED THAT THAT WAS THE APPROACH WE WOULD TAKE AS OPPOSED TO CANCELING THE DISTRIBUTORS, AND THAT THIS APPROACH WOULD BE PRESENTED AT THE CHICAGO MEETING.

Q. FOLLOWING THE MEETING, WHAT, IF ANYTHING, DID YOU DO, IN OTHER WORDS, TO BE PREPARED TO PORTRAY KENNETH B. LEIGHTON AS A NATIONAL DISTRIBUTOR AT THE UPCOMING CHICAGO MEETING?

A. I PUT TOGETHER A SERIES OF STATISTICS, AS FAR AS SALES, CUSTOMERS, NUMBER OF OUTLETS, THAT TYPE OF THING, AS A COMPARISON CHART BETWEEN EACH DISTRIBUTOR.

Q. WOULD YOU TAKE A MOMENT NOW AND LOCATE EXHIBIT 441 IN YOUR BOOK?

IS EXHIBIT 441 A CHART THAT YOU PREPARED FOR PRESENTATION AT THE FEBRUARY, '82, SALES MEETING IN CHICAGO?

A. YES.

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MR. SHOHET: I WOULD OFFER IT INTO EVIDENCE, YOUR HONOR.

THE COURT: IS THERE ANY OBJECTION?

MR. BOMSTER: NO OBJECTION, YOUR HONOR.

(PLAINTIFFS' EXHIBIT 441 RECEIVED.)

MR. SHOHET: MAY I PUBLISH IT TO THE JURY?

THE COURT: YES.

BY MR. SHOHET:

Q. FIRST OF ALL, DID YOU PREPARE EXHIBIT 441 FOLLOWING THE MEETING THAT WE HAVE JUST BEEN DISCUSSING, FOLLOWING THE MEETING AT KENNETH B. LEIGHTON'S OFFICE AND PRIOR TO THE CHICAGO SALES MEETING?

A. YES.

Q. WAS EXHIBIT 441 ACTUALLY PRESENTED AT THE CHICAGO MEETING AMONG ALL THE DISTRIBUTORS?

A. YES.

Q. ARE THE FIGURES FOR OHIO CUSHIONS FOR DECEMBER, 1981, CORRECT OR INCORRECT?

A. INCORRECT.

Q. DID YOU PREPARE EXHIBIT 441, INTENTIONALLY INSERTING AN INCORRECT FIGURE IN DECEMBER, 1981, FOR OHIO CUSHIONS' SALES FIGURES?

A. YES.

Q. IN WHAT SENSE IS THE DECEMBER, 1981, FIGURE INCORRECT? HOW IS IT INCORRECT?

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A. THE FIGURE IS INFLATED.

Q. BY HOW MUCH IS IT INFLATED, OR HOW DID YOU COME UP WITH THAT FIGURE, IF YOU REMEMBER?

A. I TOOK THE ORDERS PLACED FOR JANUARY AND ROLLED THEM BACK INTO DECEMBER.

Q. DID YOU INCLUDE THE DECEMBER FIGURES AS WELL AS THE JANUARY FIGURES?

A. I ADDED DECEMBER AND JANUARY TOGETHER AND CREATED THAT AS THE DECEMBER FIGURE.

Q. WHY DID YOU DO THAT?

A. BECAUSE ORIGINALLY, IN ORDER TO SELL THE IDEA TO THESE DISTRIBUTORS THAT – ABOUT KEN'S EXPERTISE AND THE BENEFIT OF IT, WE TRIED TO HAVE A COMPARISON GRAPH. ON THAT COMPARISON GRAPH, AT THAT TIME, KEN'S PERFORMANCE WAS NOT – WAS GOOD, BUT NOT – WE DID NOT FEEL STRONG ENOUGH TO BE ABLE TO CONVINCE THEM THAT HE WAS THAT FAR AHEAD OF THEIR OWN BUSINESSES.

Q. WHOSE IDEA WAS IT TO FALSIFY THE SALES FIGURE FOR DECEMBER, 1981, FOR PRESENTATION AT THE MEETING IN CHICAGO?

A. KEN LEIGHTON, SR.

Q. IN ADDITION TO THIS DOCUMENT, DO YOU REMEMBER A GRAPH BEING CREATED FOR USE AT THE FEBRUARY SALES MEETING THAT DEPICTED THE VARIOUS SALES LEVELS OF THE REGIONAL DISTRIBUTORS?

A. YES.

Q. AND DID THAT GRAPH ALSO OVERSTATE KENNETH B. LEIGHTON AND OHIO CUSHIONS' PERFORMANCE FOR DECEMBER, 1981?

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A. YES.

Q. DID THE ATTEMPT TO USE THE SALES FIGURES AS A MEANS OF PERSUADING THE OTHER REGIONAL DISTRIBUTORS TO RECOGNIZE OHIO CUSHIONS AS THE NATIONAL LEADER WORK?

A. NO.

Q. FOLLOWING THE – BY THE WAY, LET'S COVER THAT MEETING NOW.

THE MEETING THAT WE HAVE BEEN TALKING ABOUT WHERE THESE FIGURES WERE PRESENTED, THAT WAS A FEBRUARY 10, 1982, MEETING IN CHICAGO, RIGHT?

A. YES.

Q. WHO PAID FOR THE EXPENSES TO ATTEND THAT AMONG THE DISTRIBUTORS?

A. ALL OF THE DISTRIBUTORS PAID FOR THEIR OWN EXPENSES TO GET THERE, LODGING. THEY ALSO WERE ASKED TO CONTRIBUTE TO SOME OF THE COST OF THE SHOW.

Q. IN ADDITION TO PRESENTING THE SALES FIGURES THAT WE HAVE JUST BEEN TALKING ABOUT, WAS THERE ANY FURTHER DISCUSSION AT THE SALES MEETING CONCERNING THE PRICING REQUIREMENTS, SPECIFICALLY THE REQUIREMENT TO HOLD THE RESALE PRICE?

A. YES. THERE WAS A SPECIFIC DISCUSSION ABOUT MAINTAINING CONSISTENCY ON THE WHOLESALE PRICE.

Q. DO YOU REMEMBER ANY FURTHER DISCUSSION ABOUT THE NEED TO CONTROL THE RETAIL PRICE, AS WELL, AT THE MEETING?

A. NO.

Q. NOW, WAS JOHN BURNE ALSO PRESENT AT THIS SALES MEETING IN

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CHICAGO?

A. YES.

Q. DID HE PARTICIPATE AT ALL, OR DID HE JUST SIT THERE?

A. HE DID NOT PARTICIPATE.

Q. NOW, FOLLOWING THE MEETING IN CHICAGO ON FEBRUARY 10, DID YOU REPORT BACK TO KENNETH M. LEIGHTON REGARDING YOUR OBSERVATION THAT IT WAS NOT GOING TO WORK – THAT IS, THE USE OF THESE SALES FIGURES WAS NOT GOING TO PERSUADE THE OTHER DISTRIBUTORS TO GIVE UP THEIR TERRITORIES TO KENNETH B. LEIGHTON OR RECOGNIZE HIM AS THE NATIONAL LEADER?

A. YES, I DID.

Q. FOLLOWING THAT CONVERSATION WITH KENNETH M. LEIGHTON, DO YOU RECALL HAVING DISCUSSIONS WITH HIM CONCERNING HOW TO – DISCUSSIONS, IF AT ALL, CONCERNING HOW TO DEAL WITH THE OTHER REGIONAL DISTRIBUTORS?

A. THERE WERE NUMEROUS DISCUSSIONS AFTER THAT POINT ABOUT THIS ISSUE.

Q. AND JUST TELL ME WHAT THE TOPIC OF THOSE DISCUSSIONS – WE'LL PICK THEM UP IN DETAIL AS WE GO, BUT WHAT WAS THE GENERAL TOPIC OF THE DISCUSSIONS THAT YOU HAD WITH KENNETH N. LEIGHTON AFTER YOU REPORTED THIS TO HIM?

A. THE PROBLEM WAS, SINCE WE WERE NOT SUCCESSFUL IN CONVINCING THE DISTRIBUTORS TO RECOGNIZE KEN, THEN WE WERE BACK TO THE FIRST RECOMMENDATION THAT HAD BEEN MADE AT THE LAST WEEK IN JANUARY, AT KEN LEIGHTON, JR.'S, OFFICE, TO CANCEL THE DISTRIB-

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UTORS.

NOW, THE PROBLEM WITH THAT IS: THE DISTRIBUTORS WERE PERFORMING ADEQUATELY AT THIS TIME. I STILL MAINTAINED THAT YOU – THAT, EVEN THOUGH THERE IS NO CONTRACT, THERE WAS SOME TYPE OF VERBAL COMMITMENT TO THESE PEOPLE.

Q. DO YOU RECALL MORE THAN ONE CONVERSATION AFTER YOUR REPORT TO MR. LEIGHTON, SR., CONCERNING THE FEBRUARY MEETING ON THE SUBJECT OF WAYS TO GET RID OF THE OTHER DISTRIBUTORS?

A. THROUGHOUT THE COURSE OF 1982, YES.

Q. DO YOU REMEMBER HOW MANY CONVERSATIONS ON THE SUBJECT OF ELIMINATING OTHER DISTRIBUTORS YOU HAD WITH KENNETH M. LEIGHTON THROUGHOUT 1982 AND UP TO YOUR LEAVING SORBO, INC.?

A. I CAN'T RECALL THE EXACT NUMBER.

Q. I WOULD LIKE TO TURN FOR A MOMENT TO THE ADVERTISING BUDGETS THAT WERE SET FOR THE REGIONAL DISTRIBUTORS OTHER THAN THE TWO TRADE SHOWS.

OTHER THAN THE TRADE SHOWS THAT YOU HAVE IDENTIFIED, DO YOU REMEMBER HAMILTON KENT OR SORBO PAYING ANYTHING FOR THE NATIONAL ADVERTISING OF SORBOTHANE?

A. THEY WERE PAYING SOMETHING INTO THE NATIONAL AD BUDGET.

Q. TAKE A LOOK, IF YOU WOULD, FOR A MOMENT, AT EXHIBIT 442 IN THE BOOK.

HAVE YOU FOUND IT?

A. YES.

Q. CAN YOU IDENTIFY EXHIBIT 442?